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Yeo Ping Tieng & Ors v Elitprop Sdn Bhd

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-127–11 OF 2017
AHMAD MAAROP PCA, AZAHAR MOHAMED CJ (MALAYA), RAMLY ALI, ABANG ISKANDAR AND IDRUS HARUN FCJJ
20 NOVEMBER 2019

C

Land Law — Indefeasibility of title and interests — Fraud — Housing developer breached agreement to transfer land to individual who had fully paid purchase price — Developer instead sold land to related company at absurdly low price — Whether facts of case and relationship between developer and related D *company showed fraudulent collusion and conspiracy to deprive the individual of the land — Whether fraud vitiated the transfer of the land to the related company and rendered its title defeasible and liable to be set aside under s 340(2)(a) of the National Land Code — Whether Court of Appeal committed serious miscarriage of justice in wholly side-stepping issue of fraud pleaded by plaintiffs and found* E *proven by trial court and deciding appeal upon a wrong premise of facts and law — Whether COA's proposition that only a registered proprietor of land could create a beneficial estate out of his title and validly pass a beneficial interest in the land was erroneous in law — Whether COA failed to acknowledge that buyer who had fully paid purchase price held equitable interest/ownership in the land and pending* F *registration of transfer in his name vendor merely held the land as bare trustee*

The second appellant ('Biaxis') was awarded a contract to carry out piling works in a new housing project by the project's main contractor ('Design Selection'). The developer of the project was Janavista Sdn Bhd ('Janavista'). G Biaxis completed its contract but Design Selection failed to pay Biaxis RM1,477,972.89 for work done. In order to settle the debt, Design Selection, Janavista and Biaxis entered into a settlement agreement ('the SA') under which Janavista agreed to transfer to Biaxis or its nominee a piece of land with a 2 1/2 storey bungalow erected thereon ('the land') free of encumbrances. At the time, H Janavista was only the beneficial owner of the land which was part of a larger master title owned by another party ('PKNS'). The parties to the SA agreed that the land would be transferred to the first appellant ('Yeo') as Biaxis' nominee. Yeo was the director and shareholder of Biaxis at the time. Concurrent with the SA, Janavista signed an agreement ('the SPA') to sell the land to Yeo for I RM879,335 while Design Selection signed another agreement with Yeo ('the HCA') to construct a RM1,008,565 bungalow on the land. Vacant possession of the land together with the completed bungalow was to be delivered up to Yeo within 36 months. Both Janavista and Design Selection confirmed by letter that Yeo had fully paid for the land and the bungalow. Yeo obtained banking

facilities from the third appellant ('PBB') to, inter alia, redeem the land from Janavista's financier by paying RM566,370 on Janavista's undertaking that once it obtained the separate title for the land, it would be handed over to PBB. Janavista, however, sold the land to its related company, Elitprop Sdn Bhd ('Elitprop') for a mere RM314,844 and authorised PKNS to transfer the land directly to Elitprop. When they came to know about the transfer, Yeo and Biaxis sued Janavista, Design Selection and Elitprop for declarations asserting their legal rights over the land and to set aside the transfer to Elitprop. PBB later joined the suit as a co-plaintiff. Before the trial of the suit, Janavista and Design Selection were both wound up and they did not participate in the trial which only proceeded between the appellants and Elitprop. In their suit, the appellants alleged that Elitprop's title to the land was defeasible on the ground of fraud. The High Court agreed and set aside the transfer of the land to Elitprop, declared Yeo as the lawful owner of the land, declared Janavista's agreement to sell the land to Elitprop as invalid, and ordered the land register to be rectified so that Yeo was registered as the owner of the land in place of Elitprop and that PBB was registered as holding a charge on the land. The Court also ordered the sum of RM314,844 to be repaid to Elitprop. The High Court found from the evidence that Elitprop was not a bona fide purchaser and that Janavista and Elitprop had 'with full planning' committed fraud on the appellants to deprive them of the land. The Court of Appeal ('COA'), however, set aside the High Court's decision and, without at all addressing the question of fraud as found by the High Court, decided the appeal in Elitprop's favour using the issue of 'beneficial interest' to reject Yeo's and Biaxis' claims. The COA ruled that only a registered proprietor could create a beneficial estate out of his title and validly pass a beneficial interest; that since the title to the land at the material time was in PKNS' name, Janavista only had a beneficial interest in the land and Elitprop, therefore, acquired a good title. The Federal Court granted the appellants leave to appeal against the COA's decision on eight questions of law, one of which was whether a beneficial interest in land could only be created by its registered proprietor.

Held, unanimously allowing the appeal, setting aside the decision of the COA and reinstating the decision of the High Court except the order that Yeo pay Elitprop the sum of RM314,844:

(1) Under the SA of 4 April 2006, Janavista expressly declared that it was the beneficial owner of the land, that the land was then under a master title held by PKNS and that a separate title for the land had yet to be issued. This was a false representation as it was discovered later that separate titles in the name of PKNS were already issued in 2005. After PBB redeemed the land from Bumiputra Commerce Bank, Janavista, as the beneficial owner entitled to the transfer of the land from PKNS, was to forward the subdivided title and registrable documents in favour of Yeo to PBB. Instead, Janavista sold the land to Elitprop for an absurdly low price of

RM314,844. The sale was highly suspicious and the purchase price lower than the sum at which the land was redeemed and far below the purchase price paid by Yeo. Janavista told PKNS to execute the transfer of the land directly in favour of Elitprop. All this was done surreptitiously. On the evidence, Janavista never really intended to fulfill its obligation to sell the land to Yeo and all it wanted was to get the land transferred to Elitprop. Janavista and Elitprop colluded to get the land registered in the latter's name. There was a deliberate and dishonest act to deprive Yeo of his existing legal right to the land. There was the intention to cheat Yeo of such right (see paras 37–38 & 40).

(2) Janavista and Elitprop were related companies which engaged in a common scheme to deprive Yeo of the land. William Tan and his wife were directors of a company that wholly owned Janavista. William and his sister, Shirley, were the directors of Janavista while William's sister-in-law was the director and shareholder of Elitprop at the time of the sale to Elitprop. William and Shirley signed the sale agreement for Janavista. Shirley was the one who instructed PKNS to transfer the subdivided title direct to Elitprop. Janavista, Design Selection and Elitprop occupied and carried on business at the same premises (see para 39).

(3) On the totality of the oral and documentary evidence, the trial court was entitled, and correct, to find that Elitprop and Janavista had committed fraud on the appellants with 'full planning'. The evidence irresistibly and unmistakably pointed to the fact that Elitprop was party or privy to the fraud and had conspired with Janavista to defraud the appellants. As such, s 340(2)(a) of the National Land Code came into play to render Elitprop's title defeasible and liable to be set aside at the instance of the appellants (see paras 42–43).

(4) The Court of Appeal ('COA') committed a fundamental error in judicial adjudication when it totally failed to deal with or examine the fraud issue especially when the appellants' case was based on fraud and the trial court had made a determination on the existence of fraud. By ignoring the fraud issue, the COA erred in law and misdirected itself. The COA's judgment was based upon a wrong premise of facts and law which resulted in a serious miscarriage of justice warranting appellate intervention. It was the expectation of all parties in litigation that the court would focus on the pleaded issues and not be side-tracked into dealing with unpleaded issues (see para 44).

(5) Elitprop argued that the trial court's judgment was a non-speaking one which deserved to be set aside for not giving reasons for its finding of fraud. But a reading of the trial court's judgment in its entirety did not show that it had failed to give reasons for its conclusions. When the judgment together with full transcript of the oral evidence of the

witnesses and the contemporaneous documentary evidence and the submissions made at trial were read in full, appraised and reconsidered, it was obvious why the trial court found Elitprop was party or privy to the fraud and that Elitprop together with Janavista had conspired to defraud the appellants. This was not a case where the findings of the trial court depended exclusively on the assessment of the credibility and reliability of a witness but more of a case where the appellate court was at liberty to draw its own inferences from the proven or admitted facts. The decision of the trial court was neither perverse nor against the weight of the evidence. There was no cogent reason to disturb the primary findings. Based on this court's own analysis of the facts, Janavisita and Elitprop were not honest and the transfer of the land between them was the product of fraud and conspiracy in which Elitprop had full knowledge of Janavista's pre-existing sale to Yeo. They perpetrated fraud. Their conduct was plainly unconscionable (see paras 46–47 & 50).

(6) Although Yeo and Biaxis were the earlier purchasers in point of time of the land compared to Elitprop, the COA rejected the claims of the former on the basis that Janavista only had a beneficial interest in the land since the title was in the name of PKNS. The COA's proposition that only a registered proprietor of land could create a beneficial estate out of his title and validly pass a beneficial interest was erroneous in law. In so holding, the COA failed to take into account that equitable rights could be held over land by persons other than registered proprietors. It also failed to consider the bare trustee concept that applied where a vendor had been paid the purchase price in full. Beneficial interest in land might be in the form of beneficial or equitable ownership where the buyer had paid the purchase price in full and was awaiting registration of the title in his/her name. In the interim, the vendor was a bare trustee holding the land for the buyer-beneficial owner without the right to deal with the land in a manner inconsistent with the buyer's rights (see paras 51–52 & 55–54).

[Bahasa Malaysia summary

Perayu kedua ('Biaxis') telah dianugerahkan kontrak untuk menjalankan kerja piling di projek perumahan baru oleh kontraktor utama projek ('Design Selection'). Pemaju projek tersebut ialah Janavista Sdn Bhd ('Janavista'). Biaxis telah menyelesaikan kontraknya tetapi Design Selection gagal untuk membayar Biaxis sebanyak RM1,477,972.89 untuk kerja yang telah dilakukan. Untuk melangsaikan hutang tersebut, Design Selection, Janavista dan Biaxis mengadakan perjanjian penyelesaian ('SA') di mana Janavista bersetuju untuk memindahkan ke Biaxis atau nomininya sebidang tanah dengan sebuah banglo 2 1/2 tingkat yang didirikan di atasnya ('tanah tersebut') bebas daripada *encumbrances*. Pada masa itu, Janavista hanyalah pemilik tanah yang benefisial yang merupakan sebahagian daripada hak milik yang lebih besar yang dimiliki oleh pihak lain ('PKNS'). Pihak-pihak dalam SA bersetuju

bahawa tanah tersebut akan diserahkan kepada perayu pertama ('Yeo') sebagai nomini Biaxis. Yeo adalah pengarah dan pemegang saham Biaxis pada masa itu. Janavista telah menandatangani perjanjian ('SPA') bersama-sama dengan SA, untuk menjual tanah tersebut kepada Yeo dengan harga RM879,335 sementara Design Selection menandatangani perjanjian lain dengan Yeo ('HCA') untuk membina sebuah banglo bernilai RM1,008,565 di atas tanah tersebut. Pemilikan tanah yang kosong bersama-sama dengan banglo yang telah siap akan diserahkan kepada Yeo dalam masa 36 bulan. Kedua-dua Janavista dan Design Selection mengesahkan melalui surat bahawa Yeo telah membayar sepenuhnya balasan tanah tersebut dan banglo tersebut. Yeo telah mendapatkan kemudahan perbankan daripada perayu ketiga ('PBB') untuk, antara lain, menebus tanah dari pembiaya Janavista dengan membayar RM566,370 atas perjanjian Janavista bahawa setelah memperoleh hakmilik tanah yang telah dipisahkan, ia akan diserahkan kepada PBB. Janavista, bagaimanapun, telah menjual tanah tersebut kepada syarikat yang berkaitan, Elitprop Sdn Bhd ('Elitprop') dengan harga hanya RM314,844 dan memberi kuasa kepada PKNS untuk memindahkan tanah tersebut terus ke Elitprop. Apabila mengetahui tentang pemindahan tersebut, Yeo dan Biaxis menuntut Janavista, Design Selection dan Elitprop untuk pernyataan yang menyatakan hak undang-undang mereka atas tanah tersebut dan menolak pemindahan ke Elitprop. PBB kemudiannya menyertai saman tersebut sebagai plantif bersama. Sebelum perbicaraan saman itu, Janavista dan Design Selection kedua-duanya telah digulung dan mereka tidak mengambil bahagian dalam perbicaraan yang hanya berlangsung antara perayu dan Elitprop. Dalam saman mereka, perayu mendakwa bahawa hak milik Elitprop ke atas tanah itu adalah tidak sah atas alasan fraud. Mahkamah Tinggi bersetuju dan mengetepikan pemindahan tanah itu ke Elitprop, menyatakan Yeo sebagai pemilik tanah yang sah, menyatakan kesepakatan Janavista untuk menjual tanah itu kepada Elitprop sebagai tidak sah, dan memerintahkan pendaftaran tanah itu diperbaiki supaya Yeo didaftarkan sebagai pemilik tanah sebagai ganti kepada Elitprop dan kemudiannya PBB didaftarkan sebagai penggadai ke atas tanah tersebut. Mahkamah juga memerintahkan wang berjumlah RM314,844 dikembalikan kepada Elitprop. Mahkamah Tinggi mendapati daripada bukti bahawa Elitprop adalah bukan pembeli yang bona fide dan bahawa Janavista dan Elitprop telah 'dengan penuh perancangan' melakukan fraud terhadap perayu-perayu untuk merampas tanah tersebut. Mahkamah Rayuan ('Mahkamah Rayuan'), bagaimanapun, mengetepikan keputusan Mahkamah Tinggi dan, tanpa menjawab persoalan fraud sebagaimana yang dinyatakan oleh Mahkamah Tinggi, memutuskan rayuan tersebut memihak Elitprop menggunakan isu 'kepentingan benefisial' untuk menolak tuntutan Yeo dan Biaxis. Mahkamah Rayuan memutuskan bahawa hanya pemilik yang berdaftar yang boleh membuat harta benefisial daripada hak miliknya dan secara sah memberikan kepentingan benefisial; bahawa kerana hak milik tanah pada waktu material adalah atas nama PKNS, Janavista hanya mempunyai kepentingan benefisial terhadap tanah itu dan oleh itu, Elitprop, memperoleh

hak milik benefisial. Mahkamah Persekutuan memberi kebenaran kepada para perayu untuk mengemukakan rayuan terhadap keputusan Mahkamah Rayuan mengenai lapan persoalan undang-undang, salah satunya ialah sama ada kepentingan benefisial atas tanah hanya dapat dibuat oleh pemilik yang berdaftar.

Diputuskan, dengan sebulat suara membenarkan rayuan, mengetepikan keputusan Mahkamah Rayuan dan mengembalikan keputusan Mahkamah Tinggi kecuali perintah Yeo untuk membayar Elitprop sejumlah RM314,844:

(1) Di bawah SA bertarikh 4 April 2006, Janavista dengan jelas menyatakan bahawa ia adalah pemilik benefisial tanah tersebut, bahawa tanah itu pada masa itu di bawah hak milik utama yang dipegang oleh PKNS dan hak milik individu untuk tanah tersebut masih belum dikeluarkan. Ini adalah representasi yang salah kerana telah didapati bahawa hak milik individu atas nama PKNS telah dikeluarkan pada tahun 2005. Setelah PBB menebus tanah tersebut dari Bumiputra Commerce Bank, Janavista, sebagai pemilik benefisial yang berhak atas pemindahan tanah dari PKNS, memerlukan geran yang telah dibahagikan dan dokumen untuk mendaftarkan bagi pihak Yeo dan PBB. Namun, Janavista telah menjual tanah itu kepada Elitprop dengan harga yang sangat rendah iaitu RM314,844. Jualan itu sangat mencurigakan dan harga pembelian adalah lebih rendah daripada jumlah tanah yang ditebus dan jauh lebih rendah di bawah harga pembelian yang dibayar oleh Yeo. Janavista telah memberitahu PKNS untuk melaksanakan pemindahan tanah tersebut secara langsung kepada Elitprop. Semua ini dilakukan secara sembunyi. Berdasarkan bukti tersebut, Janavista tidak pernah berniat untuk memenuhi tanggungjawabnya untuk menjual tanah itu kepada Yeo dan hanya inginkan untuk menyerahkan tanah tersebut kepada Elitprop. Janavista dan Elitprop bersekongkong untuk mendapatkan tanah yang didaftarkan atas nama Elitprop. Terdapat tindakan yang sengaja dan tidak jujur untuk memintas Yeo daripada hak undang-undangnya yang ada pada tanah tersebut. Terdapat niat untuk menipu Yeo daripada mendapatkan hak undang-undangnya (lihat perenggan 37–38 & 40).

(2) Janavista dan Elitprop adalah syarikat-syarikat yang berkaitan yang bersepakat untuk merampas tanah tersebut daripada Yeo. William Tan dan isterinya adalah pengarah sebuah syarikat yang dimiliki sepenuhnya oleh Janavista. William dan adiknya, Shirley, adalah pengarah Janavista sementara kakak ipar William adalah pengarah dan pemegang saham Elitprop pada masa penjualan kepada Elitprop. William dan Shirley menandatangani perjanjian penjualan untuk Janavista. Shirley adalah orang yang mengarahkan PKNS untuk memindahkan geran yang telah dibahagi terus ke Elitprop. Janavista, Design Selection dan Elitprop menduduki dan menjalankan perniagaan di premis yang sama (lihat perenggan 39).

(3) Dari keseluruhan bukti lisan dan dokumentari, mahkamah perbicaraan berhak, dan benar, untuk mengetahui bahawa Elitprop dan Janavista telah melakukan fraud terhadap perayu dengan 'perencanaan penuh'. Bukti telah dengan jelas dan tanpa keraguan menunjukkan bahawa Elitprop telibat dan mengetahui fraud itu dan telah berkomplot dengan Janavista untuk menipu perayu-perayu. Oleh yang demikian, s 340(2)(a) Kanun Tanah Negara yang digunakan untuk menjadikan status geran Elitprop tidak boleh dipersoalkan adalah boleh diketepikan oleh perayu-perayu (lihat perenggan 42–43).

(4) Mahkamah Rayuan melakukan kesalahan yang asas dalam penghakiman apabila gagal menangani atau memeriksa isu fraud terutama ketika kes perayu adalah berdasarkan kepada fraud dan mahkamah perbicaraan telah membuat keputusan bahawa mengenai wujudnya fraud. Dengan mengabaikan isu fraud, Mahkamah Rayuan telah terkhilaf dalam undang-undang dan ke arah yang salah. Keputusan Mahkamah Rayuan berdasarkan pada premis fakta dan undang-undang yang salah yang telah mengakibatkan ketidakadilan yang serius yang memerlukan campur tangan rayuan. Adalah menjadi harapan semua pihak dalam proses pengadilan bahawa mahkamah seharusnya fokus kepada isu-isu yang diplidkan dan tidak terkeliru dengan isu yang tidak diplidkan (lihat perenggan 44).

(5) Elitprop berhujah bahawa keputusan mahkamah perbicaraan adalah keputusan yang tidak dapat dibahaskan dan wajar diketepikan kerana tidak memberikan alasan untuk menyatakan terdapat fraud. Namun keputusan secara keseluruhan penghakiman tidak menunjukkan bahawa ia gagal memberikan alasan terhadap kesimpulannya. Apabila penghakiman bersama transkrip penuh bukti lisan oleh saksi-saksi dan bukti dokumentari yang selari dan penghujahan yang dibuat pada perbicaraan dibaca secara menyeluruh, dinilai dan dipertimbangkan semula, ianya jelas menunjukkan mengapa mahkamah perbicaraan mendapati Elitprop adalah parti atau mengetahui mengenai fraud tersebut dan bahawa Elitprop bersama Janavista telah bersekongkol untuk menipu perayu-perayu. Ini bukanlah kes di mana penemuan mahkamah perbicaraan bergantung sepenuhnya pada penilaian kredibiliti dan kebolehpercayaan saksi tetapi lebih kepada kes di mana Mahkamah Rayuan dengan bebas membuat kesimpulan sendiri dari fakta yang terbukti atau diakui. Keputusan mahkamah perbicaraan tidak salah mahupun tidak selari dengan bebanan bukti. Tidak ada alasan yang meyakinkan untuk menidakkan penemuan utama. Berdasarkan analisis fakta oleh mahkamah ini sendiri, Janavisita dan Elitprop adalah tidak jujur dan pemindahan tanah di antara mereka adalah hasil fraud dan konspirasi di mana Elitprop mempunyai pengetahuan sepenuhnya mengenai penjualan Janavista yang telah dilaksanakan kepada Yeo. Mereka telah melakukan fraud. Tingkah laku mereka jelas tidak dapat

dipertimbangkan (lihat perenggan 46–47 & 50).

(6) Walaupun Yeo dan Biaxis merupakan pembeli tanah tersebut terdahulu berbanding Elitprop, Mahkamah Rayuan menolak tuntutan mereka dengan alasan bahawa Janavista hanya memiliki kepentingan benefisial ke atas tanah tersebut karena hak miliknya adalah atas nama PKNS. Cadangan Mahkamah Rayuan bahawa hanya pemilik tanah yang berdaftar dapat membuat harta estet daripada haknya dan secara sah meluluskan kepentingan benefisial adalah salah dari segi undang-undang. Oleh itu, Mahkamah Rayuan telah gagal mengambil kira bahawa hak equiti dapat dipegang ke atas tanah oleh individu selain daripada pemilik yang berdaftar. Mahkamah Rayuan juga gagal mempertimbangkan konsep pemegang amanah yang berlaku di mana penjual telah dibayar harga pembelian sepenuhnya. Kepentingan benefisial ke atas tanah boleh dalam bentuk pemilikan yang benefisial atau equiti di mana pembeli telah membayar harga pembelian sepenuhnya dan sedang menunggu pendaftaran hak milik ke atas namanya. Sementara itu, penjual adalah hanya pemegang amanah yang memegang tanah untuk pemilik benefisial yang merupakan pembeli tanpa hak untuk mengurus tanah dengan cara yang tidak selari dengan hak pembeli (lihat perenggan 51–52 & 55–54).]

Cases referred to

Butler v Fairclough (1917) 23 CLR 78 (refd)
China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)
Datuk Jaginder Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196, FC (refd)
English v Emery Reimbold & Strick Ltd [2002] 3 All ER 385, CA (folld)
Fels v Knowles (1906) 26 NZLR 604, CA (refd)
Flannery and another v Halifax Estate Agencies Ltd [2000] 1 All ER 373, CA (refd)
Frazer v Walker and Radomski [1967] 1 AC 569, PC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Goh Hooi Yin v Lim Teong Ghee & Ors [1990] 3 MLJ 23, HC (refd)
Hassan Kadir & Ors v Mohamed Moidu Mohamed & Anor [2011] MLJU 1556; [2011] 5 CLJ 136, FC (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768, FC (refd)
Karrupiah Chettiar v Subramaniam [1971] 2 MLJ 116, FC (refd)
Loi Hieng Chiong v Kon Tek Shin [1983] 1 MLJ 31, FC (refd)
Loke Yew v Port Swettenham Rubber Co Ltd [1913] AC 491, PC (refd)

Low Huat Cheng & Anor v Rozdenil bin Toni and another appeal [2016] 5 MLJ 141, FC (refd)
Malaysian International Trading Corp Sdn Bhd v Interamerica Asia Pte Ltd and others [2002] 2 SLR (R) 896 (refd)
Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh [1969] 2 MLJ 196 (refd)
Mosbert Berhad (in liquidation) v Chatib bin Kari [1985] 1 MLJ 162, FC (refd)
PJTV Denson (M) Sdn Bhd & Ors V Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136, FC (refd)
Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293, FC (refd)
Peninsular Land Development Sdn Bhd v K Ahmad [1970] 1 MLJ 149, FC (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)
Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81, FC (refd)
Tan Ong Ban v Teoh Kim Heng [2016] 3 MLJ 23; [2016] 3 CLJ 193, FC (refd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)
Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] 1 MLJ 87, PC (refd)
Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd [1926] AC 101, PC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 78(1)
National Land Code ss 89, 206(1), (3), 340(1), (2), (2)(a), 417

Appeal from: Civil Appeal No W-02(W)-1230–08 of 2015 (Court of Appeal, Putrajaya)

Cyrus V Das (SK Liow, Barry Goh and Jennifer Lai with him) (Liow & Co) for the appellant.
Chow Siew Wai (Austen Pereira with him) (Chooi, Saw & Lim) for the respondent.

Azahar Mohamed FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants from the judgment of the Court of Appeal that reversed the judgment of the High Court, in allowing the appellants' claim that the registered title of the respondent as the proprietor of the land in question was defeasible on the ground of fraud. The appeal concerns a piece of land together with a 2 1/2 storey bungalow to be erected thereon.

[2] The appellants are the plaintiffs in the High Court. The respondent is the third defendant. The parties will be referred to according to the titles assigned to them in the High Court.

BACKGROUND FACTS

[3] Janavista Sdn Bhd ('the first defendant') was at the material time a housing developer of a project. On 12 August 2005, the main contractor, Design Selection Sdn Bhd ('the second defendant') awarded Biaxis Sdn Bhd ('the second plaintiff') a contract for piling works on a project land ('project works').

[4] The project works was completed by the second plaintiff on 30 December 2005 with the certificate of practical completion issued accordingly. However, the second defendant failed to pay the second plaintiff the amount of RM1,477,972.89 for the project works done ('the sum due'). In order to resolve the sum due, the second plaintiff, first defendant, and second defendant mutually agreed to enter into a settlement agreement dated 4 April 2006 ('settlement agreement').

[5] As reflected in the settlement agreement, the first defendant was the beneficial owner of a parcel of land, and had intended to subdivide the said land into bungalow lots, one of which is identified as Lot PT 8656, measuring approximately 6,297.09 sqft ('the land') and thereafter to develop the area into an exclusive gated bungalows' housing estate known as the 'Polo Vista'. Perbadanan Kemajuan Negeri Selangor ('PKNS') was the registered proprietor of the land. On 20 July 2005, issue document title for the land was issued to PKNS, as the proprietor.

[6] The second plaintiff agreed to accept the transfer of the land from the first defendant to the second plaintiff and/or its nominee, 'free from encumbrances … together with the house erected thereon …' in full settlement of the sum due. Mr Yeo Ping Tieng ('the first plaintiff') (as the shareholder and director of the second plaintiff at the material time) was nominated by the second plaintiff for the purpose of being the nominated purchaser under the settlement agreement.

[7] Apart from the settlement agreement, the parties on 4 April 2006 also concurrently signed two other inter-related agreements.

[8] The second agreement was a sale and purchase agreement signed between the first defendant and the first plaintiff for the sale of the land at the price of RM879,335 ('SPA').

A **[9]** The third agreement was a house construction agreement ('HCA') signed between the second defendant and the first plaintiff for the construction of a bungalow on the land for the construction price of RM1,008,565. resulting in the total purchase price of the land and the bungalow to be RM1,887,900.

B

[10] Pursuant to the SPA and the HCA, the first defendant was to deliver vacant possession and the second defendant was to complete the remaining construction of the bungalow within 36 calendar months from 4 April 2006.

C

[11] As the SPA and the HCA were entered by the parties pursuant to the settlement agreement, both the first and second defendants through their respective letters both dated 24 May 2006 had duly confirmed that the purchase price of the land and the bungalow had been paid in full by the first D plaintiff, and further confirmed that they have no claims whatsoever against the first plaintiff in respect of the SPA and the HCA.

[12] In August 2006, the first plaintiff obtained banking facilities from Public Bank Bhd. ('third plaintiff') to, inter alia, redeem the land then charged E by the first defendant to Bumiputra Commerce Bank. The land was assigned to the third plaintiff as security.

[13] The third plaintiff redeemed the land by payment of a redemption sum of RM566,370 on behalf of the first defendant to Bumiputra Commerce Bank. F The first defendant gave a counter undertaking that the separate title once issued will be released to the third plaintiff.

[14] As it turned out, on 28 July 2009 the first defendant sold the land to G Elitprop Sdn Bhd ('the third defendant') for the sum of RM314,844.

[15] On 8 September 2009 the first defendant wrote to PKNS, the then registered proprietor of the land under a master title, which had now been issued with separate titles, to execute the transfer of the said land in favour of H the third defendant.

[16] Consequently, on 12 October 2009 the third defendant became the registered proprietor of the land. As seen earlier, the first defendant had previously sold the land to the first plaintiff and had been paid the purchase I price in full by the first plaintiff.

[17] The dispute arose when the first and second plaintiffs discovered from a firm of solicitors about the transfer of the land to the third defendant. When they found out about this on 26 August 2010, they commenced the present

suit in the High Court for declarations asserting their legal rights over the land and to declare as invalid the alleged sale to the third defendant. Later, the third plaintiff joined the suit as a co-plaintiff.

[18] Meanwhile, the first plaintiff lodged a caveat over the land to preserve his legal rights. The third defendant sought removal of the said caveat on the ground that the first plaintiff had no caveatable interest in the land. The High Court dismissed the application and retained the first plaintiff's caveat over the land. On 5 April 2012, the Court of Appeal dismissed the third defendant's appeal seeking to remove the first plaintiff's caveat.

[19] The matter was then set for trial in the High Court in August 2013. However, the second defendant, which was to build the bungalow for the first plaintiff on the land was wound-up before the trial. Prior to the trial, the second defendant entered into a consent order dated 23 October 2013 through the official liquidator and acknowledged the validity of the HLA and that it had been paid in full for the costs of the bungalow and further acknowledged the first plaintiff's lawful ownership of the land.

[20] The trial proceeded with only the third defendant defending the claim filed by the plaintiffs. On the eve of the trial, the first defendant was also wound-up.

[21] The first defendant therefore did not participate at the trial and did not therefore have to explain the re-selling of the land to the third defendant after having received the purchase price in full from the first plaintiff.

AT THE HIGH COURT

[22] The plaintiffs' claim against the third defendant lies within the narrow compass. In a nutshell, the plaintiffs alleged that title to the land in the hand of the third defendant was defeasible by reason of fraud or insufficient instrument. Based on the pleadings, the High Court principally was to decide whether the exceptions to indefeasibility of title, as set out in s 340(2) of the National Land Code ('the NLC') applied to the facts of the case.

[23] The High Court held in favour of the plaintiffs. The High Court granted, among others, the following claims subject to a sum of RM314,844 to be paid to the third defendant:

(a) a declaration that the SPA dated 4 April 2006 is valid, and the first plaintiff is the lawful owner of the land;

(b) a declaration that the HCA dated 4 April 2006 is valid, and the first plaintiff is the lawful owner of the bungalow;

(c) a declaration that the second sales and purchase agreement dated 28 July 2009 is invalid;

(d) a declaration that the third plaintiff is entitled to be registered as the chargor on the land;

(e) a declaration that any subsequent sale and purchase transaction of the land (if any) is also invalid;

(f) a valid and transferable/registrable memorandum of transfer in favour of the first plaintiff and the original document of title of the land be delivered by first defendant to third plaintiff, for presentation and registration; and

(g) an order for rectification be given to the Land Office pursuant to s 417 of the NLC that the third defendant be removed from the title of the land and the first plaintiff be registered as the registered proprietor on the title of the land, and the third plaintiff be registered as the chargor on the title of the land.

[24] Significantly, the High Court after evaluating the evidence concluded that the third defendant was not a bona fide purchaser of the land and that the third defendant and the first defendant had committed fraud on the plaintiffs with 'full planning' to achieve the purpose. This was the basis of the judgment of the High Court. Consequently, the third defendant's title was set aside.

AT THE COURT OF APPEAL

[25] The third defendant appealed to the Court of Appeal. As we have indicated earlier, the Court of Appeal reversed and set aside the decision of the High Court, effectively dismissing the plaintiffs' claim. In so holding, it bears noting that the Court of Appeal did not address the principal question of fraud that had been found by the High Court against the defendants.

[26] In its place, the beneficial interest issue formed the basis of the Court of Appeal's decision to reject the claim of the first and second plaintiffs although they were the earlier purchasers in point of time of the land compared to the third defendant.

[27] The Court of Appeal adverted to the fact that the first defendant as vendor had only a beneficial interest in the land since the title was in the name of PKNS. The Court of Appeal held that only registered proprietor can create a beneficial estate out of his title and validly pass a beneficial interest. Hence, the Court of Appeal concluded that the third defendant had acquired a good title.

[28] The result of the Court of Appeal's decision upholding the registration of the title in the name of the third defendant, is that the third plaintiff stands to lose its security.

AT THE FEDERAL COURT

[29] This court had granted leave to the plaintiffs to bring the present appeal on the following eight questions of law:

(a) whether a beneficial interest in land can only be created by a registered proprietor of the subject land?

(b) whether the beneficial owner of a subject land can in law validly pass title to a purchaser and thereafter become a bare trustee of the said land on behalf of the said purchaser?

(c) where the beneficial owner subsequently re-sells the same subject property to a third party, whether the first purchaser would have the right to impeach the registration of the title in the name of the third party under s 340 of the NLC?

(d) where the title of the current registered proprietor of land is impeached by an earlier purchaser, on grounds of, inter alia, fraud under s 340, whether it is open to a court to ignore the plea of fraud on the grounds of alleged lack of locus standi of the plaintiff to attack the title?

(e) whether any party claiming an adverse interest in a subject land would have the necessary standing to attack the title of the current registered proprietor under s 340 on any grounds stated therein?

(f) where the purchaser of the subject land is an assignor of the said land to a bank (as assignee) under a loan agreement but is joined in the suit to impeach the title of the current registered proprietor by the assignee bank, whether that confers sufficient locus standi to the plaintiffs to jointly impeach the said registration with the assignee?

(g) where there are competing claims to be registered by rival purchasers, whether priority is settled solely by determining who has first become registered on the title or whether it is incumbent for the court to determine firstly if the current registered proprietor is guilty of fraud and conspiracy to defeat the rights of the rival purchaser to get on the title? and

(h) whether indefeasibility under s 340 for purposes of determining immediate or subsequent purchaser is to be decided by reference to the transaction or registration on the title?

[30] The questions of law broadly refer to beneficial ownership of land, creation of beneficial interest in land, locus standi to challenge registration of title and priority of interests in land.

[31] As we have seen earlier, the High Court found that the registration of title in the name of the third defendant was obtained by fraud and conspiracy. The trial court found that the fraud was committed with 'full planning' and that the third defendant was not a bona fide purchaser but a party who had full knowledge of the antecedent facts.

[32] At the hearing before us, learned counsel for the plaintiffs submitted that the Court of Appeal completely failed to deal with the fraud question. This is the essence of his argument. It was submitted that this was a fundamental error in judicial adjudication especially where a party's case was based on fraud and the trial court had made a determination of existence of fraud but the appeal court omitted to consider the fundamental issue.

[33] On the other hand, learned counsel for the third defendant approached the appeal before us in the following manner. He submitted that the plaintiffs must prove actual fraud. The plaintiffs alleged in their pleading that the third defendant was a party to the fraud because: (i) the first defendant sold the subject land to the third defendant without the first and/or second plaintiffs' consent or knowledge; (ii) the first defendant breached cl 10.02 of its agreement with the first plaintiff; (iii) the first defendant sold the subject property to the third defendant undervalue; and (iv) the first and third defendants were related to each other in that they shared a common company secretary and registered address. Learned counsel contended that that particulars (i), (ii) and (iv) are not matters that could indicate fraud by the third defendant. And particular (iii) alone as concluded by the High Court, was insufficient to make out a case of actual fraud. He further argued that the plaintiffs failed to prove actual fraud to impeach the third defendant's title. Accordingly, on the pleading point alone, learned counsel argued this appeal must be dismissed. On the questions of law posed, it was submitted that the failure of the plaintiffs to prove their case on the pleading point alone renders the said questions academic.

[34] In our judgment, the present case falls to be decided by reference to the provisions of s 340(1) and (2) of the NLC. In this regard, the plaintiffs' case depended to a large extent on whether there was fraud within the meaning of sub-s (2) of s 340 of the NLC. It is therefore apposite to set out in extenso the relevant provisions, with the necessary emphasis as follows:

> 340 Registration to confer indefeasible title or interest, except in certain circumstances

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The tile of interest of any such person or body shall not *be indefeasible* —

(a) In any case of *fraud* or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) Where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) Where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

[35] The central principle of our land tenure and dealing in land is that the title to the land and the rights of all persons holding an interest therein, once registered, are indefeasible. Upon registration, it vests in the person in whose favour the registration is effected, an indefeasible title to the land and/or the interest therein. As underlined by s 89 of the NLC, the register is conclusive evidence that the title is vested in the person or body for the time being named as the proprietor and that the land is subject to such conditions, restrictions in interest and other provisions as specified in the title. The concept of indefeasibility of title entrenches the title of a registered proprietor to his land, making it immune from attack against the whole world (see *Frazer v Walker and Radomski* [1967] 1 AC 569 and *Fels v Knowles* (1906) 26 NZLR 604). As stated by Raja Azlan Shah CJ (as His Highness then was) in *PJTV Denson (M) Sdn Bhd & Ors V Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136, 'The concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it. Therefore, the registration of the transfer of the said land under the National Land Code defeats all prior unregistered interests in that land unless the party who acquires the registered title has been guilty of fraud'. Indefeasibility, nevertheless, is not unqualified or absolute. Under certain situations, the registered title and/or interest can still be challenged notwithstanding the fact that the instrument of transaction has been duly registered with the relevant land registry. Section 340(2) of the NLC specifies circumstances where a registered title or interest may be set aside: (i) on the ground of fraud to which the person or body, or any agent of the person or body is a party or privy; (ii) on the ground of misrepresentation to which the person or body, or any agent of the person or body is a party or privy; (iii) on the ground of forgery; and (iv) on the ground of an insufficient or void instrument; and (v) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law. Where for example fraud is established, an indefeasible title may be set aside or defeated. Two types of indefeasibility are recognisable, namely,

immediate indefeasibility and deferred indefeasibility. It is trite that the Torrens System in Malaysia recognises deferred indefeasibility of title or interest (see *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269, *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768 and *Low Huat Cheng & Rozdenil bin Toni and another appeal* [2016] 5 MLJ 141).

[36] As the registered proprietor of the land, s 340(1) of the NLC confers on the third defendant an indefeasibility of title in the land. Nonetheless, in the present case, the third defendant's title is liable to be set aside and shall not be indefeasible if it was a party or privy to fraud. 'Fraud' within the meaning of s 340(2)(a) of the NLC means actual fraud and not constructive or equitable fraud on the part of the person whose title or interest is being impeached. This issue has been considered in a number of cases. There must be actual fraud to defeat a person of his title or interest. It must involve dishonesty of some sort — a willful and conscious disregard and violation of the rights of other persons, which was committed prior to or at the time of registration (see *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81, *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101). Fraud may be established if the designed object of a transaction is to cheat a man of a known existing right or where by a deliberate and dishonest act a person loses an existing right (see *Loi Hieng Chiong v Kon Tek Shin* [1983] 1 MLJ 31). Mere knowledge of the existence of an unregistered claim or interest in the land may not amount to fraud unless there is a deliberate and dishonest attempt to deprive the unregistered claimant of his claim or interest therein (see *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491). It is not enough to show that the transfer had the effect of depriving the plaintiff of a known existing right; it must be demonstrated that the transfer was executed with the intention of cheating the plaintiff of such right (see *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23). Fraud may occur where the designed object of a transfer is to cheat a person of an existing right or where by a deliberate and dishonest act a person is deprived of his existing right (see *Datuk Jaginder Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196 (FC)). The term 'fraud' in that provision also imports personal dishonesty or moral turpitude (see *Butler v Fairclough* (1917) 23 CLR 78). The standard of proof for fraud in civil proceedings is on the balance of probabilities (see *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584). Whether or not fraud exists is a question of fact to be decided on the facts and circumstances of each case.

[37] It is with the above principles in mind that we address the issue of fraud in the present case. In so doing we take into account several items of evidence, which must be considered in its entirety. As seen earlier, on 4 April 2006, three agreements were executed. The effect of these agreements was that the first

defendant would dispose of the land to the first plaintiff (as the second plaintiff's nominee) for a purchase price of RM879,335 and the second defendant would construct a bungalow on the land for the costs of RM1,008,565. The second defendant would set off these two amounts against the amount due to the first plaintiff as aforesaid. The first and second defendants had already acknowledged the first plaintiff to be the purchaser of the land, and further confirmed that both the defendants were in receipt of full payment from the first plaintiff on 24 May 2006. Under the settlement agreement, the first defendant expressly declared that it was the beneficial owner of the land. The said land was at the material time held under a master title by PKNS. It was further declared in the settlement agreement that a separate title on the land has yet to be issued. This turned out to be a false representation as it was discovered later that separate titles in the name of PKNS had already been issued in 2005. On 6 September 2006, the third plaintiff redeemed the land by payment of a redemption sum of RM566,370 on behalf the first defendant to Bumiputra Commerce Bank. The first defendant gave a counter undertaking that the separate title once issued would be released to the third plaintiff. The first defendant as the beneficial owner entitled to the transfer from PKNS was to forward the subdivided title and registrable instruments in favour of the first plaintiff to third plaintiff.

[38] Instead, after the redemption, the first defendant sold the land on 28 July 2009 to the third defendant for the mere sum of RM314,844. The sale was highly suspicious and the purchase price was even lower than the price at which the land was redeemed. The first defendant then arranged to transfer the title of the land to the third defendant shortly after the agreement was entered between the first and third defendants. On 8 September 2009 the first defendant wrote to PKNS, the then registered proprietor of the land under a master title, which had now been issued with separate titles, to execute the transfer of the said land in favour of the third defendant. All this was done surreptitiously. The first defendant did not participate at the trial and did not therefore have to explain the re-selling of the land to the third defendant after having received the purchase price in full from the first plaintiff. In the result, the third defendant became the registered proprietor of the land, which the first defendant had previously sold to the first plaintiff and had been paid the purchase price in full by the first plaintiff. On the evidence, we found that the first defendant never really intended to fulfill the obligation of the agreement to sell the land to the first plaintiff and that all it wanted was to get the land transferred to the third defendant. As regards the third defendant, it must have known what was going on, as we shall see later, the first defendant and the third defendant are related companies. It is the conduct of the defendants as a whole and the consideration of the case in its entirety that we are concerned with. The first and third defendants colluded to get the land registered in the name of the

latter. There was a deliberate and dishonest act to deprive the first plaintiff of his existing legal right in the land. There was the intention of cheating the first plaintiff of such right.

[39] What is even more glaring is the fact that the first defendant and the third defendant are related companies which engaged in a common scheme to transfer the land away from the first defendant to avoid its contractual obligations to the first plaintiff. The relationship between the first defendant and the third defendant must be understood through the shareholding and directorships of one William Tan and Shirley Tan through Tiger Synergy Bhd (formerly called 'Minply Holdings (M) Bhd'). Tiger Synergy Bhd wholly owns Goldenier Property Management Sdn Bhd, which in turn wholly owns the first defendant. The said William Tan and Shirley Tan are brother and sister. William Tan and his wife, Sek Chian Nee are the directors of Goldenier. William Tan Wei Lian and Shirley Tan Lee Chin are the directors of the first defendant. William Tan's sister-in-law, Sek Chian Yoo, is the director and shareholder of the third defendant. She was the director at the time of sale to the third defendant. William Tan together with his co-director, Shirley Tan signed the sale agreement. The said Shirley Tan was also the person who gave the instructions to PKNS to transfer the subdivided title direct to the third defendant and thereby defeated the rights of the first plaintiff to registration. Another matter that must be noted is that apart from the inter-related individuals, all the three defendants occupied and carried on business at the same premises viz Wisma Hwa Lian in Seremban (which is also the headquarters for Tiger Synergy).

[40] Another feature of the case to which we must emphasize is that the sale to the third defendant came in July 2009 after the first plaintiff had redeemed the subject land for the first defendant for the sum of RM566,370 from Bank Bumiputra in September 2006. The land became free of encumbrances and it was after this that the first defendant through its director, Shirley Tan directed PKNS to transfer the subdivided title to the third defendant. The sale price paid by the third defendant was RM314,844. which in the circumstances was an absurdly low price. The price was even below the redemption sum paid for the property and far below the price of RM1.887m being the purchase price paid by the first plaintiff earlier in 2006 to the first defendant.

[41] It was against the aforesaid background that the High Court made the following pertinent observation regarding the question of proving fraud:

> Fraud happened in situation where the dishonesty was committed to benefit the people/parties who planned and executed it, by depriving its victim from its legitimate right and caused damages to the victim. No fraud will be committed with the intention to be known. Therefore, fraud is not something that is easy to be detected/see.

[42] In its judgment, the High Court then made the finding that the third defendant and the first defendant had committed fraud on the plaintiffs with the 'full planning' to achieve the purpose:

> Referring to the evidence/testimony, the fact and the specific circumstances in this case and on balance of probabilities, the court found that defendant 3 could not be taken as someone who had purchase the property without knowing its actual scenario.
>
> Defendant 1 was found to have done it with full knowledge of the actual circumstances.
>
> It was also the finding of the court that fraud was committed in this case with full planning. Plaintiff 2 was framed not only once but also twice. After the works for the bored piling works amounting to more than one million was not paid, its property was then sold to another party who claimed to be a bona fide purchaser.
>
> What must be explained here is, the court's finding that defendant 3 was not a bona fide purchaser was not dependent solely on the fact that the directors of the companies involved in this case are family members and that they conduct their businesses in the same office and address.
>
> The basis of the court's finding apart from the above, the court had also examined and paid attention to the evidence, the facts, and the specific circumstances of this case. It showed to the court that through the legal process, the defendants had collaborated with the intention to benefit themselves, and it was executed to cause damages to the plaintiffs in this suit.
>
> ... Referring to the evidence, the reasons above and all the circumstances of this case, the court could not hold that what was done by defendant 1 and defendant 3 was bona fide.

[43] Based on our analysis of the facts as we have highlighted earlier, the High Court was entitled and correct in coming to the conclusion on the above primary facts. In our judgment, the totality of the oral evidence considered together with the contemporaneous documentary evidence led at the trial before the High Court irresistibly and unmistakably point to the fact that the third defendant was a party or privy to the fraud and that the first and third defendants had conspired to defraud the plaintiffs. As held in the case of *Malaysian International Trading Corp Sdn Bhd v Interamerica Asia Pte Ltd and others* [2002] 2 SLR (R) 896, 'while fraud cases rarely left behind a documentary trail, evidence of overt acts and omissions together were available to prove the fact of a conspiratorial combination or agreement'. As such, s 340(2)(a) of the NLC came into play, rendering the third defendant's title defeasible. The defeasible title of the third defendant is liable to be set aside at the instance of the plaintiffs. In the result, the third defendant would not enjoy the protection of indefeasibility under s 340(1) of the NLC.

[44] Unfortunately, the Court of Appeal failed to address and judicially appreciate the fraud issue. It totally failed to deal with and examine the fraud

issue. The Court of Appeal failed to accord this part of the case the importance it deserved. This is a fundamental error in judicial adjudication on the part of the Court of Appeal especially where a party's case is based on fraud, and the High Court had made a determination of the existence of fraud. The Court of Appeal erred in law and misdirected itself when it failed to address the question of fraud on the part of the current registered proprietor, namely, the third defendant and whether it was a bona fide purchaser and/or of its fraudulent scheme together with the so-called vendor, the first defendant to defeat the prior beneficial-cum-legal interest of the first plaintiff as found by the High Court. The judgment of the Court of Appeal was therefore based upon a wrong premise of facts and law. This was a fundamental error made by the Court of Appeal leading to its flawed judgment. It was this erroneous approach to the case that had resulted in a serious miscarriage of justice warranting appellate intervention. It is the expectation of all parties in litigation that the court would focus on the pleaded issues and not be side-tracked to dealing with unpleaded issues. Sharma J observed in *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196:

> A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure and practice to ensure that justice is done.

[45] The adoption of the above principle by this court can be seen in *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293.

[46] At the hearing before us, learned counsel for the third defendant also argued that the judgment of the High Court is in substance a non-speaking judgment. There was no judicial appreciation of evidence by the High Court (citing *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1). Except for the words 'based on the evidence' and 'on a balance of probabilities' appearing in the judgment, no reasons, according to learned counsel, was given by the High Court in arriving at a finding of fraud on the part of the third defendant. It was submitted that the third defendant is entitled to have the judgment of the High Court set aside as it has occasioned a miscarriage of justice. Learned counsel referred to us the case of *Flannery and another v Halifax Estate Agencies Ltd* [2000] 1 All ER 373 where it was held that a failure by a judge to give reasons made it impossible to tell whether he had gone wrong on the law or the facts, that failure could itself constitute a self-standing ground of appeal since the losing side would otherwise be deprived of its chance of appeal. The case appears to establish the principle that inadequate reasoning or an inadequate judgment by a trial judge would itself be a valid ground of appeal.

[47] To take our discussion further, there are two points that must be made relating to the above argument. First, we agree that the High Court was under a duty to give reasons. Fairness requires that the parties, especially the losing party, should know why they have won or lost. However, the extent of the duty to give reasons depends on the subject matter. That will differ from case to case. The present case is a straightforward factual dispute: whether title to the land in the hand of the third defendant was defeasible by reason of fraud. Having read the judgment of the High Court in its entirety, we do not agree that in the present case the High Court failed to give reasons. The High Court found that the third defendant was not a bona fide purchaser of the property and that third defendant and first defendant had committed fraud on the plaintiffs. The passage from the judgment of the High Court that we have reproduced earlier indicated the reasons why the High Court found there was 'full planning' that the transfer of the land to the third defendant was the product of fraud and conspiracy between the first defendant and the third defendant, and that the third defendant had full knowledge of the first defendant's pre-existing sale to the first plaintiff. The High Court might not have undertaken an in-depth and full analysis of the issues leading to the conclusion. The judgment of the High Court maybe argued not to contain adequate reasons. To that extent, the style and content of the judgment of the High Court may render itself open to criticism or disapproval. Still, if the third defendant were to read the High Court judgment as a whole, and not merely certain passages, it would know why it lost.

[48] Which leads us to the second point. The approach in *Flannery and another v Halifax Estate Agencies Ltd* [2000] 1 All ER 373 dealing with failure by a judge to give reasons was later reversed by the English Court of Appeal in *English v Emery Reimbold & Strick Ltd* [2002] 3 All ER 385, where the court said:

> Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. This was the approach adopted by this court in the light of Flannery's case, in *Ludlow v National Power plc* [2000] All ER (D) 1868. If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing, or to direct a new trial.

[49] In the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors*, we have said that the approach taken by *English v Emery Reimbold & Strick Ltd* [2002] 3 All ER 385 is eminently sound.

[50] Applying that approach, we had carefully examined the judgment of the

A High Court, read the full transcript of the oral evidence of witnesses as well as taking into account the contemporaneous documentary evidence and the submissions at the High Court trial. In the first place, we do not think this is a case where the findings of the High Court depend exclusively on the assessment of the credibility and reliability of a witness. This is more of a case where we are B at liberty to draw our own inferences from the facts proved or admitted (see *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163 and *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] 1 MLJ 87). When all these are appraised and reconsidered, it is obvious to us why the High C Court found the third defendant was a party or privy to the fraud, and that the first and third defendants had conspired to defraud the plaintiffs. The decision of the High Court is neither perverse or against the weight of evidence. We find no cogent reasons to disturb the primary findings. Based on our own analysis of the facts at [37]–[40] above, the first and third defendants were not honest and D that the transfer was the product of fraud and conspiracy in which the third defendant had full knowledge of the first defendant's pre-existing sale to the first plaintiff. They perpetrated fraud. Their conduct was plainly unconscionable. The general principle obtaining in such circumstances is as E stated by Lord Buckmaster in the well-known case of *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 as follows:

> If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register F clear.

[51] Our discussion thus far is sufficient to dispose of the present appeal. The decision of the High Court must therefore stand. However, in view of the approach taken by the Court of Appeal, we will proceed to deal with question G 1. It will be recalled that the beneficial interest question formed a central part of the Court of Appeal's decision to reject the claim of the first and second plaintiffs although they were the earlier purchasers in point of time of the land compared to the third defendant. The Court of Appeal adverted to the fact that the vendor, the first defendant had only a beneficial interest in land since the H title was in the name of PKNS. The Court of Appeal held categorically, 'Only a registered proprietor can create a beneficial estate out of his title'.

[52] In so holding, the Court of Appeal erred in failing to take into account the recognition of equitable rights over land held by persons other than I registered proprietors. It also failed to consider the bare trustee concept that applies in cases where a vendor has been paid the purchase price in full. Section 206(3) of the NLC gives recognition to contractual dealings over land. It expressly provides that nothing in sub-s (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein.

Subsection (1) states that all dealings in land must be duly registered by the use of the proper instrument affecting such dealing in land.

[53] In *Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196, Raja Azlan Shah J (as His Highness then was) said, '... independent of our land legislation, our courts have always recognised equitable and contractual interests in land'. Further the rules of equity recognise the creation of a beneficial interest in land under the NLC. The Federal Court in *Hassan Kadir & Ors v Mohamed Moidu Mohamed & Anor* [2011] MLJU 1556; [2011] 5 CLJ 136 explained it as follows:

> It is trite that the modified form of the Torren System of registration of titles relating to alienated land as applied under the Code does not prevent the creation of beneficial interest in land whether under 'express trust', 'constructive trust' or 'resulting trust' arising out of the operation of law. This is derived from the rules of equity which is applicable in this country by virtue of section 3 of the Civil Law Act 1956. And as was said by Syed Agil Barakbah SCJ in *Lian Keow Sdn Bhd (in Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1LNS 44.
>
> The Code restricts the kinds of interests in land which are capable of being registered, but at the same time it does not prevent or restrict the creation of beneficial interests in land by way of equitable trust .... Prior to the registration of the title, the statutory form of transfer under the Code gives a title in equity to the purchaser until registration. The vendor is said to hold his proprietary interest as constructive trustee.

[54] The beneficial interest in land may be in the form of beneficial ownership in cases where the purchaser has paid the purchase price in full and awaiting registration of the title in his or her name. In the interim period, the purchaser is the beneficial owner of the subject land in equity and the vendor becomes a bare trustee without the right to deal with the land in a manner inconsistent with the rights of the beneficial owner (see *Karrupiah Chettiar v Subramaniam* [1971] 2 MLJ 116, *Peninsular Land Development Sdn Bhd v K Ahmad* [1970] 1 MLJ 149). The equitable interest created in the land where purchase price is paid in full is referred to by the cases variously as equitable ownership, beneficial ownership or an equitable estate in the subject land. The principle applies whether or not title or subdivided titles are available immediately to vest a registrable title in the purchaser. The law that had been consistently followed by the courts in this country is that a purchaser of land who has paid the purchase price, until registration as the legal owner, acquires an equitable interest in it. It may well be that the proposed subdivided lots which they purchased did not have the legal status of being separate pieces of land until legally subdivided; nevertheless that fact does not prevent these purchasers from acquiring equitable interests to the extent of the area they had purchased (see *Mosbert Berhad (in liquidation) v Chatib bin Kari* [1985] 1 MLJ 162). This principle, in our judgment, applies to the present case as the first and

second plaintiffs (as purchasers) were awaiting the subdivision of the master title held by PKNS into sublots for transfer to them. The first defendant as the beneficial owner entitled to the transfer from PKNS was to forward the subdivided title and registrable instruments in favour of the first plaintiff to third plaintiff. An equitable owner as the purchaser of a property may exercise his contractual rights over the land albeit not having obtained registration yet in his name (see s 206(3) of the NLC). In some cases the equitable owner may decide to on-sell the property to another buyer. There is no legal impediment in this regard except that the equitable owner cannot act in fraud and engage in multiple sale of the same property (see *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23; [2016] 3 CLJ 193).

[55] It follows from the above that the proposition advanced by the Court of Appeal in this case that only a registered proprietor of land could validly pass a beneficial interest is erroneous in law. Question 1 should accordingly be answered in the negative.

CONCLUSION

[56] In consequence and in view of all the above and in the circumstances of this case, we find it unnecessary to answer the other posed questions of law.

[57] The result is that we allow the appeal with costs by setting aside the orders of the Court of Appeal. The registration of the title in the name of the third defendant be set aside and that the first plaintiff be entered in the register as the proprietor of the land. We hereby reinstate the order of the High Court save that the first plaintiff is not required to pay a sum of RM314,844 to the third defendant as ordered by the High Court.

[58] This judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as Justice Ramly Haji Ali has since retired. This is the judgment of the remaining members of the panel.

Order accordingly.

Reported by Ashok Kumar